

STATE OF MICHIGAN  
IN THE SUPREME COURT

NORTH AMERICAN BROKERS, LLC,  
a Michigan limited liability company, and,  
MARK RATLIFF, an individual,

Plaintiffs/Appellees,

Supreme Court Docket No. 155498  
Court of Appeals Docket No. 330126  
Lower Court Case No.: 15-28669-CH

vs.

HOWELL PUBLIC SCHOOLS,  
a Michigan general powers school district, and,  
ST. JOHN PROVIDENCE, a Michigan corporation,

Defendant/Appellant.

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**DEFENDANT/APPELLANT HOWELL PUBLIC SCHOOLS' REPLY IN SUPPORT OF  
APPLICATION FOR LEAVE TO APPEAL PURSUANT TO MCR 7.305(B)1, 2, 3 AND 5**

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**ORAL ARGUMENT REQUESTED**

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## ARGUMENT

**1. The Court Should Strike Plaintiffs' Untimely Answer to Defendant's Application for Leave to Appeal.**

On March 22, 2017, Defendant filed its Application for Leave to Appeal Pursuant to MCR 7.305(B)(1), (2), (3) and (5) ("Application"). Pursuant to MCR 7.305(D), a party may file an answer to the Application within 28 days of service of the Application. Pursuant to this court rule and as evidenced by this Court's docket entry for the Application, Plaintiffs' answer to the Application was due on or before April 19, 2017, which was 28 days from the date Defendant filed its Application. In defiance of MCR 7.305(D) and this Court's directive, Plaintiffs filed their answer to the Application on May 3, 2017, 42 days after Defendant filed its Application. Plaintiffs' answer was, therefore, untimely and did not conform to MCR 7.305(D). With respect to untimely filings, MCR 7.305(F) provides:

On its own initiative or on a party's motion, the Court may order a party who filed a pleading that does not substantially comply with the requirements of this rule to file a conforming pleading within a specified time or else it may strike the nonconforming pleading. The submission to the clerk of a nonconforming pleading does not satisfy the time limitation for filing the pleading if it has not been corrected in the specified time.

Plaintiff did not seek leave of the Court before filing its untimely and non-conforming answer to Defendant's Application. Plaintiff did not notify Defendant of its intention to file a late answer. Plaintiff has provided no reason for its untimely answer. Further, Plaintiffs' answer was extremely untimely, as it was filed 14 days after the 28 day deadline for doing so. Pursuant to MCR 7.305(D), the filing of an answer to an Application is permissive, is not mandated by the application court rule and Plaintiff otherwise has no right to the Court's consideration of its permissive answer. Pursuant to MCR 7.305(F), the Court should strike Plaintiffs' answer as untimely. If, however, the Court accepts and considers Plaintiffs' untimely answer, Defendant provides the following reply.

2. **Plaintiffs Incorrectly Assert That The Unsupported Legal Conclusions In Their Complaint Must Be Treated As True Under MCR 2.116(C)(7).**

In their Answer to Howell Public School's ("Howell") Application for Leave to Appeal ("Answer"), Plaintiffs repeatedly point out that Howell did not file an answer to Plaintiffs' complaint before filing a dispositive motion. That is not in dispute. Howell filed a dispositive motion, as it is permitted to do, prior to answering the complaint. What is in dispute is the import of the timing of Howell's motion with respect to the allegations in Plaintiffs' complaint. As to this issue, Plaintiffs assert the false contention that because Howell filed a dispositive motion before answering the complaint and before the completion of discovery, all legal conclusions in the complaint must be considered true and construed in Plaintiffs' favor. The purpose of Plaintiffs' assertion is to demonstrate that their unsupported legal conclusions regarding the undefined term "broker protected" means they were the procuring cause on a sale of real property that did not involve them and that they were entitled to a commission. By making this assertion, Plaintiffs attempt to salvage their otherwise unviable promissory estoppel claim by arguing that they were induced to take action based on the "broker protected" language. Plaintiffs are not entitled to this inference.

Pursuant to Michigan law, Plaintiffs may be entitled to the inference in their favor as to the factual allegation that they relied on the term "broker protected." Plaintiffs, however, are not entitled to an inference in their favor as to the legal meaning of the term "broker protected," a legal conclusion for which they provided no support and for which there is no support in Michigan law. Therefore, the fact that Howell did not file an answer to Plaintiffs' complaint before filing its dispositive motion is irrelevant to Plaintiffs' promissory estoppel claim.

According to Michigan law, summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred by the statute of frauds,

among other things. See *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). In determining whether a plaintiff's claim is barred under one of the bases enumerated in MCR 2.116(C)(7), the reviewing court will accept the undisputed factual allegations stated in the plaintiff's complaint as true unless contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The reviewing court must view the pleadings and supporting evidence in the light most favorable to the nonmoving party to determine whether the undisputed facts show that the moving party is entitled to dismissal. *Tryc v Mich Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996). If there is no factual dispute, the issue of whether a plaintiff's claim is barred is a matter of law is for the court to determine. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009); *Kincaid v Cardwell*, 300 Mich App 513, 522-23; 834 NW2d 122 (2013).

In contrast to applicable Michigan law, Plaintiffs assert that their legal conclusions regarding the meaning of the term "broker protected" must be accepted as true. This is false. Plaintiffs take this position in order to circumvent Howell's argument in their Application that only viable estoppel claims can suspend application of the statute of frauds, if at all. Because the term "broker protected" has no legal meaning in the state of Michigan, Plaintiffs pled an unviable estoppel claim in their complaint.<sup>1</sup> Because the term has no legal meaning in Michigan, no factual development, through the discovery process or Howell's answer to Plaintiffs' complaint, will save Plaintiffs' unviable claim.<sup>2</sup> Without a viable estoppel claim, Michigan law does not provide for the suspension of the statute of frauds. If the statute of frauds applies, as it

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<sup>1</sup>See pages 12 through 20, at section II of Howell's Brief in Support of Application for Leave for a full discussion of the reasons why Plaintiffs' estoppel claim is deficient and unviable and, therefore, insufficient to suspend application of the statute of frauds.

<sup>2</sup>Plaintiffs concede that the term "broker protected" has no legal meaning in Michigan. They repeatedly refer to the term as a "term of art" and cite only to non-binding and dissimilar New Jersey law to support their purported understanding of the term.

should in this matter, Plaintiffs' claims fail and the trial court correctly granted Howell's dispositive motion based on a correct reading and application of Michigan law. For the reasons set forth in Howell's Application, the Court of Appeals incorrectly reversed the trial court's dismissal of Plaintiffs' complaint because Plaintiffs merely pled a promissory estoppel claim. This decision was based on the misapplication of Michigan law and should be reversed.

**3. Plaintiffs' Reference to Inapplicable Case Law Does Nothing To Substantiate the Court of Appeals' Incorrect Application of Michigan Law Regarding the Statute of Frauds.**

In their Answer, Plaintiffs go to great lengths to discuss inapplicable Michigan case law which has no bearing on the two issues presented in Howell's Application: (1) that the Court of Appeals incorrectly applied a judicially created exception to the application of the statute of frauds, which does not comport with the clear and unambiguous language of the statute; and (2) that even if the law permitted suspension of the statute of frauds where an estoppel claim is pled, doing so is appropriate only where the plaintiff's reliance on an actual promise is reasonable.<sup>3</sup> The case law Plaintiffs cite bears no relation to the legal issues presented in Howell's Application and, nevertheless, is critically distinguishable from the instant circumstances.

Plaintiffs' reliance on the unpublished and non-binding decision, *The Anderson Assoc, Inc v Kallabat*, unpublished opinion per curiam of the Michigan Court of Appeals, Docket No. 191375 (decided February 7, 1997) is misplaced. First, unpublished opinions have "no precedential force." MCR 7.215(C)(1); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 282-283; 769 NW2d 234 (2009). Therefore, Plaintiffs'

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<sup>3</sup>Plaintiffs' Answer does not address either of Howell's arguments in its Application. Plaintiffs merely recite irrelevant and distinguishable case law in which a court determined that a commission was due. Plaintiffs' Answer does not even acknowledge Howell's primary basis for its Application, which is that the Court of Appeals' decision and the decisions upon which it relied does not comport with Michigan law which directs that clear and unambiguous statutory language must be applied as written. Plaintiffs likewise ignore any case law cited in Howell's application demonstrating that Plaintiffs failed to plead a valid and viable estoppel claim.

reliance on this decision bears no weight in their favor.

Further, even if this Court were to give this decision any credence, it is distinguishable and contains no analysis of the factual basis for the plaintiffs' promissory estoppel claim. *Anderson* is based on an alleged oral agreement regarding the payment of a commission for the sale of real property. The content of that oral agreement is not provided, but even if it were provided, there is no alleged oral agreement at issue in the present case. Indeed, there was no agreement whatsoever in the instant case. *Anderson*, therefore, assumes the existence of an agreement, making it distinguishable from the instant case. Moreover, because the factual basis for the alleged agreement in *Anderson* is not even provided, it is not persuasive authority to support Plaintiffs' assertion that the "broker protected" language on Howell's sign created a binding agreement.

In addition, the *Anderson* Court determined, with no analysis of the actual claim present in that case, that the statute of frauds did not bar a properly pled promissory estoppel claim and allowed that claim to move forward. In rendering this unsupported conclusion, the Court merely restated conclusions from other inapplicable case law. This mere quotation of other decisions, with absolutely no analysis, is not binding and provides no support for an assertion here that the statute of frauds does not apply or that the "broker protected" language constitutes a valid agreement. Even if *Anderson* were binding, the case law the Court referenced in support of its decision is distinguishable from the instant matter, as discussed in Howell's Application.

Plaintiffs' reference to *Lovely v Dierkes*, 132 Mich App 485; 347 NW2d 752 (1984) and *Conel Dev, Inc v River Rouge Savings Bank*, 84 Mich App 415; 269 NW2d 621 (1978) is equally inapplicable. The *Lovely* decision bears no resemblance to the instant matter. In *Lovely*, the plaintiff was terminated from his employment after receiving verbal assurances that he would be

provided a definite salary for a definite time, that the plaintiff would only be terminated for cause, a promise of a percentage ownership in the defendant corporation and a representation by the defendants that their verbal agreement would be reduced to writing. The court determined only that the terms of the promise at issue were specific and were intended to induce the plaintiff to leave his prior employment and work for the defendants. *Id.* at 490. *Lovely* is distinguishable from the instant case because in the instant matter, there was no oral agreement. Further, the term “broker protected” is not specific as to Plaintiffs’ alleged right to collect a commission. Finally, Plaintiffs were not involved in the real estate transaction at issue and have provided no legal basis for their assertions regarding the meaning of the term “broker protected.”

*Conel* is equally distinguishable. In *Conel*, various employees of the defendant bank made verbal assurances that the bank agreed to act as the surety for another entity. This determination was based on testimony that the parties engaged in actual face to face communications regarding the subject matter of the alleged promise, which induced the plaintiff to believe that the two had a valid and sufficient surety agreement. This is distinguishable from the instant matter, where it is undisputed that the parties did not establish a relationship, there were no oral assurances by anyone of a commission, Plaintiffs never disclosed the identity of St. John Providence (“SJP”) to Howell and both Howell and SJP unequivocally rejected Plaintiffs’ attempts to become involved in the sale of Howell’s property. Accordingly, like the other case law relied on by Plaintiffs, *Conel* is distinguishable and provides Plaintiffs no support.

*White v Production Credit Assn of Alma*, 76 Mich App 191; 256 NW2d 436 (1977) is equally inapplicable because it does not address an alleged entitlement to a commission for the sale of real property and is based on specific verbal representations that induced the plaintiff to take action and expend financial resources to his detriment. This decision was based only on the

fact that the alleged promise upon which the plaintiff relied was made up of specific verbal assurances and actual promises. Therefore, *White* is completely dissimilar to the instant matter.

In *Read v Haak*, 147 Mich 42; 110 NW130 (1906), the court did not consider the statute of frauds because the relevant provision had not yet been enacted. Therefore, this decision cannot weigh in Plaintiffs' favor because it discussed the procuring cause argument prior to the enactment of the relevant provision of the statute of frauds. Furthermore, in *Read*, there was no dispute that the parties knew the identity of brokers. In the instant case, there is no dispute, based on Plaintiffs' allegations in the complaint, that Howell was unaware that SJP had any interest in the Property based on its interactions with Plaintiffs. Similarly, in *Reed v Kurdziel*, 352 Mich 287; 89 NW2d 479 (1958), the commission at issue was related to the sale of products and not real property. Because *Reed* did not address the sale of real property, the court did not consider or apply the statute of frauds. Therefore, *Reed* is inapplicable to the instant case.

Likewise, *Case v Rudolph Wurlitzer Co*, 186 Mich 81; 152 NW 977 (1915) and *MacMillan v C & G Cooper Co*, 249 Mich 594; 229 NW 593 (1930) addressed commissions on the sale of band organs and factory engines. Therefore, those decisions are inapplicable to the instant case, which addresses only the sale of real property. Plaintiffs' reference to *Heaton v Edwards*, 90 Mich 500; 51 NW 544 (1892) is equally unpersuasive relative to Plaintiffs' position, as *Heaton* predated the legislature's adoption of the statute of frauds by a number of years. Therefore, it is inapplicable in the instant matter. Accordingly, the referenced case law relating to the "procuring cause" doctrine relative to the sale of products, not involving real estate, and decisions which do not reference the statute of frauds are inapplicable and irrelevant

in this matter.<sup>4</sup>

Likewise, Plaintiffs' reliance on an appendix to arbitration guidelines is inappropriate, as they are not binding on this or any Court. Further, Plaintiffs have not established that the referenced guidelines are applicable to arbitrations taking place in Michigan. Regardless, this is not an arbitration, the parties are not bound by "guidelines" applicable to arbitration proceedings and the referenced guidelines do not consider or even refer to Michigan law, Michigan's statute of frauds, or the term "broker protected." Nevertheless, Plaintiffs assert that "Michigan law is comprehensive and unequivocal" regarding the procuring cause doctrine. This is demonstrably false, as none of Plaintiffs' cited case law or the arbitration "guidelines" takes Michigan's statute of frauds into consideration.

### **CONCLUSION**

As demonstrated above and in Howell's Application, the applicable Court of Appeals'

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<sup>4</sup>Plaintiffs' reference to various other decisions is misplaced, incorrect and distinguishable. Plaintiffs' reliance on *Marrero v McDonnell Douglas Cap Corp*, 200 Mich App 438; 505 NW2d 275 (1993) is completely misplaced. In that case, the Court of Appeals upheld summary disposition in the defendants' favor and Plaintiffs assert that they are entitled to discovery here simply because discovery took place in *Marrero*. This in no way addresses or even acknowledges the actual issues Howell has presented on appeal. The same is true of *Pursell v Wolverine-Pentronix, Inc*, 44 Mich App 416; 205 NW2d 504 (1973), in which the plaintiff set forth extensive factual allegations of specific verbal representations in support of an alleged promise. *Clark v Coats & Suits Unlimited*, 135 Mich App 87; 352 NW2d 349 (1984) is inapplicable for the proposition that the trial court is not to engage in fact finding. In the instant matter, the trial court's determination that Plaintiffs' complaint did not contain facts supporting their claim is a legal determination, not fact finding. *Customized Transp, Inc v Bradford*, (Docket No. 96-1110) (CA6 1997) is a federal court decision which is not binding on this Court, addresses the parties' intent to enter into a settlement agreement, and addresses a promissory estoppel claim in which the promise at issue was clear and definite. *Crest the Unif. Co. v Foley*, 806 F. Supp. 164 (ED MI 1992) was superseded by statute and is, thus, inapplicable and non-binding. *Continental Iden Prod, Inc v EnterMarket, Corp*, (Docket No. 1:07-CV-402) (ED MI 2008) is inapplicable because the court determined that the plaintiff adequately pled a promissory estoppel claim, which is not the case here. *Nygard v Nygard*, 156 Mich App 94; 401 NW2d 323 (1986) is inapplicable, as it addresses an oral agreement regarding the care of a child and not legally undefined language on a sign involving a real estate commission.

decision:

- (1) Perpetuates the judicial attack on the established rules of statutory construction in Michigan, thus calling into question the validity of the statute of frauds, a legislative enactment;
- (2) Significantly impacts the public interest by eviscerating the application of the statute of frauds, a legislative enactment, particularly with respect to the statute's application to Howell, an agency of the state of Michigan;
- (3) Involves a legal principle of major significance to the state's jurisprudence, as the decision continues to attack the efficacy and validity of the statute of frauds, a legislative enactment; and
- (4) Is clearly erroneous and will cause material injustice to Howell and any other party seeking to rely on the statute of frauds, as the decision conflicts with other decisions of this Court and the Court of Appeals.

For these reasons, and the reasons stated throughout this Application, Howell respectfully requests that this Court grant leave for Howell to appeal the Court of Appeals' decision pursuant to MCR7.305(B)(1), (2), (3) and (5), overrule case law which perpetuates the judicial attack on the established rules of statutory construction and which allows an estoppel claim to override application of the statute of frauds, reverse the Court of Appeals' clearly erroneous determination and reinstate the trial court's grant of summary disposition to Howell.

Alternatively, should this Court chose not to exercise its discretion in granting leave, Howell respectfully states that due to the clear error contained in the Court of Appeals' decision, and since the Court of Appeals' result in this case significantly alters legal principles of major significance to the state's jurisprudence, this Court, in lieu of granting leave to appeal, should

issue a final decision or peremptory order reversing the Court of Appeals' decision for the reasons stated herein pursuant to MCR 7.302(H)(1).

Respectfully submitted,  
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Dated: May 24, 2017